

I'M NOT CALLING YOU A LIAR . . . : IMPLIED CERTIFICATION THEORY UNDER THE FALSE CLAIMS ACT

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I. INTRODUCTION

Courts in the United States recovered over \$3.5 billion in fiscal year 2015 from government contractors who violated the False Claims Act (FCA).¹ Even more staggering, the number jumps to \$26.4 billion when looking at recoveries since 2009.² Despite these massive recoveries under the FCA, contractors have described a lingering circuit split as “pervasive and irreconcilable.”³ Over the past year, defendants in two separate cases have petitioned for certiorari to resolve this circuit split and, as of June 16, 2016, the Supreme Court appears to have resolved this split (at least in part).⁴ However, because whether the lower courts will apply the new rule consistently remains to be seen, it is worth exploring the competing standards that led to the initial circuit split. The underlying issue is whether or not FCA claims can be brought for failure to meet the requirements of a government contract that underlie a bill for payment, as opposed to a falsification on the bill for payment itself.

The FCA was created to be a bulwark against unscrupulous contractors seeking to raid the U.S. Treasury, but critics of modern interpretations of the statute worry that the FCA is used to enforce compliance with regulations and to punish run-of-the-mill breaches of contract.⁵ Companies that seek payment from the government for

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1. *Justice Department Recovers Over \$3.5 Billion From False Claims Act Cases in Fiscal Year 2015*, U.S. DEP'T JUSTICE (Dec. 3, 2015), <https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015>.

2. *Id.*

3. Jacob Fisher, *Triple Canopy Asks High Court To Revive Appeal Of FCA Case*, LAW360 (June 11, 2015), <http://www.law360.com/articles/666307/triple-canopy-asks-high-court-to-revive-appeal-of-fca-case>.

4. *Triple Canopy, Inc. v. United States ex rel. Badr*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/triple-canopy-inc-v-united-states/> (last visited Feb. 19, 2016); *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1999 (2016).

5. Jonathan Bailyn et al., *The End of the Implied Certification Theory?: The U.S. Supreme Court Grants Certiorari in Case That Could Substantially Limit the False Claims Act*, CADWALADER (Dec. 11, 2015), <http://www.cadwalader.com/resources/clients-friends-memos/the-end-of-the-implied-certification-theory-the-us-supreme-court-grants-certiorari-in-case-that-could-substantially-limit-the-false-claims-act>; Thomas S. Crane & Brian P. Dunphy, *Will the Supreme Court Weigh In? Implied Certification Theory Under the False Claims Act*, MINTZ LEVIN (Oct. 17, 2011), <https://www.mintz.com/newsletter/2011/Advisories/1428-1011-NAT-HCED/web.htm>; Kirsten Mayer & Christopher Walsh, *Fourth Circuit Adopts “Implied Certification” Theory of False Claims Act Liability*

providing goods and services must contend not only with the obligations of their individual contracts, but any relevant regulations as well.⁶ Should a company contracting with the government fail to meet regulatory obligations, it could find itself hit with fines under both the actual regulation and the FCA, depending on which circuit the suit is filed in.⁷ This is because most circuits allow the government to bring FCA actions against a contractor who submits a facially valid invoice while failing to comply with contractual or regulatory requirements.⁸ This Casenote examines the circuit split that developed as a result of conflicting interpretations of implied certification theory—which has only recently been recognized by the Supreme Court⁹—and argues that the previous minority viewpoint should now be applied uniformly nationwide.

This Casenote first argues that implied certification is a valid doctrine and that FCA actions are cognizable based on a contractor's implied certification of full compliance with contractual obligations. Additionally, implied certification theory need not be as narrowly applied as the majority viewpoint. Misrepresentation, material omission, or concealment of noncompliance with contract requirements can constitute fraud, so long as the misrepresentation, omission, or concealment is material to the government's actual decision to pay. Part II provides the background and development of the FCA and outlines the different approaches of the circuits regarding implied certification theory. Part III argues that the minority position, which is based on materiality to the government's decision to pay, is the correct approach, as broader application is consistent with the purpose and text of the FCA, and unnecessary limitations provide loopholes through which unscrupulous contractors can defraud the government and escape FCA liability. Finally, Part IV concludes that the minority position, which recognizes a broader but appropriate application of the implied certification theory, provides sufficient guidance for litigants and is more faithful to the purpose of the FCA.

and Examines Materiality Under That Theory, ROPES & GRAY (Jan. 23, 2015), <https://www.ropesgray.com/newsroom/alerts/2015/January/Fourth-Circuit-Adopts-Implied-Certification-Theory-of-False-Claims-Act-Liability-and-Examines.aspx>.

6. *Government Contracting 101*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/tools/sba-learning-center/training/government-contracting-101> (last visited Sept. 9, 2016).

7. Robert T. Rhoad et al., *The Emerging Scope Of The Implied Certification Theory of FCA Liability—A Scalpel Or A Bludgeon?*, GOV'T CONTRACTOR, Aug. 19, 2015, at 4.

8. *Id.* at 1.

9. *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1999 (2016) (explicitly recognized implied certification as a valid theory of liability under the FCA). This case was decided after this Casenote was written but prior to publication.

II. BACKGROUND

A. History and Modern Development of the False Claims Act

In March of 1863, President Abraham Lincoln implored Congress to pass a law that would allow the government to punish individuals who lied during government contracting.¹⁰ President Lincoln was concerned with preventing contractors from fraudulently selling goods to the Union Army during the Civil War. A number of dishonest vendors had already been caught providing a variety of defective supplies to the Union, including hobbled horses, faulty weaponry, and spoiled rations.¹¹ Congress passed the False Claims Act, also known as “Lincoln’s Law,” as a result.¹²

Under the FCA, the government may bring a statutory claim against contractors who commit fraud.¹³ Additionally, individual private citizens may act as investigators and sue contractors on behalf of the government for alleged false claims.¹⁴ When a private citizen brings such an action on behalf of the government, it is known as a “qui tam” action and the citizen is known as a “relator.”¹⁵ The more commonly used term for the relator, whistleblower, will be used for this Casenote.

To encourage whistleblowers to come forward and expose contracting fraud, the FCA, in its initial form, contained a provision that awarded half of any recovery to the whistleblower.¹⁶ The FCA went mostly unchanged for 80 years until 1943.¹⁷ Due to fears that the recovery amount had proven too alluring and thus generated suits in which the government already had the information prior to the whistleblower coming forward,¹⁸ Congress made two significant changes to the Act. First, Congress substantially decreased the whistleblower’s share of the recovery.¹⁹ A reduced reward, in turn, reduced incentive for whistleblowers to come forward.²⁰ Second, if the government already

10. Larry D. Lahman, *Bad Mules: A Primer on the Federal False Claims Act*, OKLA. BAR J. (Apr. 9, 2005), <http://www.okbar.org/members/BarJournal/archive2005/Aprarchive05/obj7612fal.aspx>.

11. *Id.*

12. *Id.*

13. Alan Levins & Alison Cubre, *Pleading a Claim under the False Claims Act*, A.B.A. (May 23, 2014), <http://apps.americanbar.org/litigation/committees/trialpractice/articles/spring2014-0414-pleading-claim-under-false-claims-act.html>.

14. *Id.*

15. Lahman, *supra* note 10.

16. *Id.*

17. Samuel Long, *Controlling Contracting Fraud: The False Claims Act Pleading Standard And Its Implications For Fraud In The New Health Care System*, 44 PUB. CONT. L.J. 777, 780 (2015).

18. *Id.*

19. *Id.*

20. *Id.*; Lahman, *supra* note 10.

had information on the alleged FCA violation, the whistleblower was no longer entitled to any portion of the recovery, even if the government had not acted on the information.²¹ The 1943 amendments did more than simply reduce the number of claims brought by whistleblowers, they instead made the FCA nearly obsolete.²²

Forty years after the 1943 amendments, fraudulent government contracts were once again in the public eye. During the military buildup under the Reagan administration, reports of suppliers charging unbelievable prices for run-of-the-mill items began coming to light.²³ In an effort to curb such widespread fraudulent practices, Congress amended the FCA once again in 1986. This time Congress increased both whistleblower awards and the penalty for contractors that defrauded the government.²⁴ In addition, these amendments lowered the requisite standard of proof.²⁵ Since the 1986 amendments, the FCA has remained mostly the same, with amendments in 2009 to clarify certain terms and in 2010 as part of the Patient Protection and Affordable Care Act.²⁶

B. Liability Under the False Claims Act

The FCA currently recognizes seven instances in which an individual can be held liable for a false statement to the government.²⁷

In any of these instances, there are four elements that must be satisfied to prove that an individual or company submitted a false claim

21. Long, *supra* note 17, at 780.

22. *Id.* at 781 (finding that “[t]he number of qui tam actions dropped to about six per year” following the 1943 amendments).

23. Lahman, *supra* note 10 (reports of the government paying \$900 per toilet seat and \$500 per hammer were examples of suspicious pricing schemes).

24. *Id.*

25. *Id.*

26. *History of the False Claims Act—The Whistleblower Act*, BERNSTEIN LIEBHARD LLP, <http://www.bernlieb.com/whistleblowers/History-Of-The-False-Claims-Act/index.html> (last visited Oct. 6, 2016).

27. 31 U.S.C. § 3729(a) (2012) (“(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; (C) conspires to commit a violation of [the FCA]; (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property; (E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government . . .”).

for payment to the government: (1) false statement or course of conduct; (2) requisite scienter (knowingly); (3) materiality; and (4) claim for payment made to the government.²⁸

The term “knowingly,” as it appears in the FCA, is defined under section 3729(b)(1).²⁹ Actual knowledge of the falsity of the statement or deliberate or reckless disregard for the truth is required.³⁰ However, specific intent is not required.³¹ This means that an individual can be found liable for making a false claim even if the claim was not made with the underlying intent to defraud the government. In addition, since the FCA deals with allegations of fraud, heightened pleading standards under FRCP section 9(b) apply.³²

The FCA’s lack of a specific intent requirement, coupled with the particularity requirement of Rule 9(b), has led to conflicting pleading standards with regards to just how “specific” a whistleblower’s allegations must be.³³

Traditional liability under the FCA stems from claims that are factually false.³⁴ For example, invoicing the government for goods that were never actually delivered, or invoicing the government for a different type of goods than were actually delivered.³⁵ However, it is not always clear whether FCA liability arises from claims that are legally false—e.g., the invoice itself is accurate, but the contractor submitting the invoice failed to meet some contractual requirement on which the invoice is predicated. This second type of liability rests on a theory called “false certification,” which assumes that the government never would have entered the initial contract had it known of the false statement. Courts generally recognize FCA liability when a contractor expressly certifies compliance with specific legal and contractual requirements,³⁶ but have been significantly less uniform in situations where a contractor does not expressly affirm compliance.³⁷ “Implied certification theory” states that, by submitting a claim in the first place, a contractor is implying that it complies with all legal and contractual

28. *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 634 (4th Cir. 2015).

29. 31 U.S.C. § 3729(b)(1) (2012).

30. *Id.*

31. *Id.*

32. FED. R. CIV. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”).

33. *Levins & Cubre*, *supra* note 13.

34. *Rhoad et al.*, *supra* note 7, at 1 (“[E]g., a contractor mischarges the Government for goods or services that were never delivered.”).

35. *United States v. Kapp*, 302 U.S. 214, 215–16 (1937); *Nye & Nissen v. United States*, 336 U.S. 613, 615–16 (1949).

36. *Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001); *Crane & Dunphy*, *supra* note 5.

37. *Crane & Dunphy*, *supra* note 5; *Rhoad et al.* *supra* note 7.

requirements.³⁸

Circuits are split into three camps on whether an allegation brought under a theory of implied certification is actionable.³⁹ Of the circuits that have heard a case involving implied certification, the Seventh Circuit stands alone in outright rejecting the theory. The majority of circuits recognize FCA liability under implied certification only when the contractor misrepresents compliance with an “express condition of payment.”⁴⁰ In contrast, the minority viewpoint recognizes liability whenever the contractor’s failure to comply would have been “material to the Government’s decision to pay.”⁴¹

C. Circuit Court Interpretations of Implied Certification Theory

Most circuits have adopted some form of implied certification. While the Seventh Circuit rejected the doctrine, the Fifth Circuit appears to have declined to either reject or permit implied certification at this time.⁴² Eight of the remaining circuits, along with the D.C. Circuit, have allowed FCA claims to proceed under implied certification. The Second, Third, Sixth, Ninth, Tenth, and Eleventh Circuits have applied the express-condition-of-payment standard,⁴³ while the First and Fourth Circuits have applied the material-to-the-government’s-decision-to-pay standard.⁴⁴ It is currently unclear as to which standard the D.C. Circuit applies, as it has used both at different times.⁴⁵

38. Rhoad et al., *supra* note 7, at 2.

39. *Id.*

40. *Id.*

41. *Id.*

42. *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 700 (7th Cir. 2015); *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010).

43. *Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001); *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 313 (3d Cir. 2011); *United States ex rel. Hobbs v. MedQuest Assocs., Inc.*, 711 F.3d 707, 715 (6th Cir. 2013); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1168 (10th Cir. 2010); *United States ex rel. Keeler v. Eisai, Inc.*, 568 F. App’x 783, 799 (11th Cir. 2014).

44. *United States v. Universal Health Servs., Inc.*, 780 F.3d 504, 512 (1st Cir. 2015) *cert. granted in part*, 136 S. Ct. 582 (2015); *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 637 (4th Cir. 2015).

45. *United States v. Sci. Applications Int’l Corp.*, 626 F.3d 1257, 1271 (D.C. Cir. 2010) (holding that a false claim can be proved under an implied certification theory if compliance with the “requirement in question is material to the government’s decision to pay”); *United States ex rel. Davis v. District of Columbia*, 793 F.3d 120, 124 (D.C. Cir. 2015), *cert. denied sub nom. Davis v. District of Columbia*, 136 S. Ct. 699 (2015) (holding that a false claim can be based on an implied certification of compliance with government regulations, but only when compliance is a condition of payment).

1. Rejection of Implied Certification: *United States v. Sanford-Brown, Ltd.*

The Seventh Circuit has declined to impose liability under the FCA when whistleblowers bring suit based on a theory of implied certification.⁴⁶ In *United States v. Sanford-Brown, Ltd.*, a former Director of Education at a for-profit college brought suit under the FCA on allegations that the school, Sanford-Brown College, had falsely indicated that it was in compliance with federal Title IV regulations.⁴⁷ Title IV provides schools with federal funding to be used as student financial aid.⁴⁸ Funds are predicated on schools meeting certain eligibility requirements and are granted based on enrollment and retention of students.⁴⁹ Additionally, in order to receive Title IV subsidies at all, Sanford-Brown was required to enter into a Program Participation Agreement (PPA) with the government.⁵⁰ The whistleblower alleged that Sanford-Brown had falsified its student enrollment, attendance, and retention records, as well as manipulated student grades to keep students eligible for financial aid.⁵¹ By doing so, Sanford-Brown had violated Title IV regulations, to which Sanford-Brown had agreed to adhere by entering into the PPA.⁵² By extension, Sanford-Brown had therefore violated the FCA.⁵³

The Seventh Circuit rejected the whistleblower's argument that Sanford-Brown had violated the FCA by entering into the PPA and then subsequently applying for funding while knowing that it was not in compliance with all Title IV regulations.⁵⁴ The analysis turned on whether the school had intended to defraud the government at the time it agreed to comply with all Title IV regulations.⁵⁵ If Sanford-Brown had entered into the PPA in good faith, the court reasoned, then any subsequent violation of the PPA (such as noncompliance with Title IV regulations) was a mere breach of contract, not a violation of the FCA.⁵⁶ In order to trigger FCA liability, the whistleblower needed to allege that

46. *Sanford-Brown*, 788 F.3d at 700.

47. First Amended Complaint ¶ 16, *Nelson v. Career Educ. Corp.*, 2013 WL 6162673 (E.D. Wis. Nov. 22, 2013) (No. 12-CV-775), 2013 WL 10937954.

48. *Id.* ¶ 21.

49. *Id.* ¶ 24–25.

50. *Id.* ¶ 24.

51. *Id.* ¶ 5.

52. First Amended Complaint, *supra* note 47, ¶ 8.

53. *Id.* ¶ 9.

54. *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 700 (7th Cir. 2015).

55. *Id.*

56. *Id.* at 711.

Sanford-Brown's initial application was fraudulent.⁵⁷ "Failure to comply with Title IV Restrictions subsequent to its entry into a PPA" would not suffice.⁵⁸ Further, compliance with the Title IV regulations was really a condition of participation in the federal program, not a condition of payment.⁵⁹ This determination was vital for the claim under the FCA, as the FCA only governs false claims for payment.⁶⁰ By drawing a stark distinction between breach of government contracts and violation of the FCA, the Seventh Circuit became the only circuit to reject outright the implied certification theory.⁶¹

2. Express Condition of Payment

The Sixth Circuit affirmed its adoption of the "express-condition-of-payment" standard in 2013 with *United States ex rel. Hobbs v. MedQuest Associates, Inc.*⁶² Medquest, the defendant contractor, was a diagnostic testing company that operated a large number of testing centers.⁶³ As part of Medicare Part B, Medquest would file reimbursement claims with the government for its services. In 2006, a former employee filed a whistleblower suit against Medquest, and the government later took over.⁶⁴ Medquest allegedly violated the FCA in two separate ways: (1) using supervising physicians who were not approved by the Medicare program and (2) failure to reregister and reenroll an acquired facility in the Medicare program.⁶⁵

The lower court found that Medquest's actions triggered FCA liability, concluding that submitting Medicare claims for payment "implicitly certified that [its services] were provided in accordance with applicable Medicare regulations."⁶⁶ On appeal, the Sixth Circuit reversed on the grounds that compliance with supervising-physician requirements and reenrollment requirements were not express conditions of payment.⁶⁷ The court acknowledged that "Medquest was not in

57. *Id.*

58. *Id.*

59. *Id.* at 712.

60. 31 U.S.C. § 3729(a) (2012).

61. Rhoad et al., *supra* note 7.

62. *United States ex rel. Hobbs v. MedQuest Assocs., Inc.*, 711 F.3d 707, 714 (6th Cir. 2013).

63. *Id.* at 710.

64. *Id.*

65. *Id.*

66. *Id.* at 712.

67. *Id.* at 714 (Despite reversing the lower court's ruling against Medquest, the Court of Appeals noted that Medquest had "skirted and appear[ed] to have often ignored applicable regulations in the conduct of its centers." Ultimately, the Court determined such actions were better addressed through administrative sanctions.).

complete regulatory compliance” but found that the Medicare claims themselves met the requirements for payment.⁶⁸ The FCA, as the Court read it, “is not a vehicle to police technical compliance with complex federal regulations,” and should not trigger liability in “the absence of conditions of payment.”⁶⁹ Therefore, in the Sixth Circuit, FCA liability based on implied certification can only be triggered if a contractor submits an invoice to the government while knowingly in violation of an express precondition to payment.⁷⁰

The Second Circuit adopted an express-condition-of-payment standard in 2001 with its decision in *Mikes v. Straus*.⁷¹ The *Mikes* court expressed concerns similar to those of the Sixth Circuit, finding that the FCA “was not designed for use as a blunt instrument to enforce compliance with all medical regulations—but rather only those regulations that are a precondition to payment.”⁷² The Second Circuit was concerned that the FCA is punitive in nature, and to use it as a tool to punish regulatory violations that are not express preconditions of payment would be an improper broadening of the statute.⁷³ The four other circuits that have since explicitly adopted this view (the Third, Ninth, Tenth, and Eleventh) expressed similar concerns.⁷⁴

3. Material to the Government’s Decision to Pay

Enforcing liability under the FCA only when the false statement pertains to the claim for payment itself, as the Seventh Circuit approached the question, places strict limits on whistleblower suits.⁷⁵ While implied certification theory opens up new circumstances under which a contractor can face FCA liability, requiring an express condition of payment restricts courts to narrow enforcement.⁷⁶ The broadest interpretation, however, is limited not by whether the government would refuse to pay outright if it knew about the false statement, but instead whether the government’s decision to pay would

68. *MedQuest*, 711 F.3d at 715.

69. *Id.* at 717.

70. *Id.*

71. *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001).

72. *Id.* at 699.

73. *Id.*

74. *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 313 (3d Cir. 2011); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d at 998 (9th Cir. 2010); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1168 (10th Cir. 2010); *United States ex rel. Keeler v. Eisai, Inc.*, 568 F. App’x. 783, 799 (11th Cir. 2014).

75. *See generally* *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015).

76. *Ab-Tech Const., Inc. v. United States*, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994).

be materially affected.⁷⁷

The Fourth Circuit applied the “materially affected” standard in *United States v. Triple Canopy, Inc.*, but has since been instructed to reconsider its decision in light of *Universal Health Services*.⁷⁸ The defendant in *United States v. Triple Canopy, Inc.* was a security firm contracted to provide armed guards at an air force base in Iraq.⁷⁹ Triple Canopy hired Ugandan guards to serve under a much smaller number of American supervisors.⁸⁰ As part of the contract, Triple Canopy was required to certify that each guard passed a minimum “marksmanship requirement.”⁸¹ However, once the Ugandan guards arrived onsite, the American supervisors discovered that they could not satisfy the marksmanship requirement.⁸² After a failed attempt to rectify the problem through training, Triple Canopy allegedly falsified personnel records showing that the guards had in fact qualified with the requisite marksmanship scores.⁸³

Triple Canopy submitted twelve invoices for payment totaling over \$4.4 million, despite the fact that its contractors could not meet the marksmanship requirement.⁸⁴ One of the employees directed to falsify the personnel files brought a whistleblower claim, and the government subsequently intervened. The government alleged that Triple Canopy had violated the FCA by falsifying personnel records and then billing “the full price for each and every one of its unqualified guards.”⁸⁵ The lower court dismissed the complaint for failure to state a claim, and in doing so essentially rejected liability under implied certification.⁸⁶ The court granted Triple Canopy’s motion to dismiss on the grounds that the government had not shown that Triple Canopy “submitted a demand for payment that contained an objectively false statement.”⁸⁷

The Fourth Circuit reversed, reasoning that the lower court had construed the term “false or fraudulent claim” too narrowly and that

77. *Id.*

78. *Triple Canopy, Inc. v. United States ex rel. Badr*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/triple-canopy-inc-v-united-states/> (last visited Mar. 14, 2017).

79. *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 640 (4th Cir. 2015), *cert. granted and judgment vacated sub nom.* *Triple Canopy, Inc. v. United States ex rel. Badr*, 136 S. Ct. 2504, 195 L. Ed. 2d 836 (2016).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 632–33.

84. *Id.* at 633.

85. *United States v. Triple Canopy*, 775 F.3d at 633.

86. *United States ex rel. Badr v. Triple Canopy, Inc.*, 950 F. Supp. 2d 888, 905 (E.D. Va. 2013), *aff’d in part, rev’d in part sub nom.* *United States v. Triple Canopy, Inc.*, 775 F.3d 628 (4th Cir. 2015).

87. *Id.* at 890.

FCA liability should be cognizable whenever a false statement could potentially result in financial loss to the government.⁸⁸ Acknowledging that a mere breach of contract should not be shoehorned into a FCA charge, the Court focused on the statute's underlying goal of protecting the U.S. Treasury from any form of fraud.⁸⁹ Offering a broad definition of the implied certification theory, the Court articulated the standard of inquiry as whether “the contractor, with the requisite scienter, made a request for payment under contract and ‘withheld information about its noncompliance with material contractual requirements.’”⁹⁰ Just a few months after the Fourth Circuit's decision in *Triple Canopy*, the First Circuit also adopted a material-to-the-government's-decision-to-pay standard, albeit with somewhat different reasoning.⁹¹

In summary, most circuits allow both whistleblowers and the government to allege violation of the FCA based on a theory of implied certification. However, the circuits that do recognize implied certification theory disagree over whether implied certification theory is limited to express conditions of payment, or encompasses any misrepresentation or omission that would be material to the government's decision to pay.

III. DISCUSSION

In order to ensure that the FCA serves its purpose—protecting the Treasury from fraudulent contractors⁹²—it is important that courts recognize application of the implied certification theory. However, the government's use of the FCA to stamp out fraud must be weighed against the risk of harm to individuals who do not intend to defraud the government but are instead simply breaching a government contract or violating a regulation. Therefore, this Casenote argues that a narrower interpretation such as the express-condition-of-payment standard is more appropriate for three reasons. First, the material-to-the-government's-decision-to-pay standard reflects the common law materiality element of fraud. Second, the material-to-the-government's-

88. *United States v. Triple Canopy*, 775 F.3d at 640.

89. *Id.* at 635.

90. *Id.* at 636 (quoting *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010)).

91. *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 780 F.3d 504, 512 (1st Cir. 2015) (stating that the circuit had recently “eschewed distinctions between factually and legally false claims, and those between implied and express certification theories, reasoning that they ‘create artificial barriers that obscure and distort [the statute’s] requirements’” and holding that the relevant inquiry was whether the contractor had “knowingly misrepresented compliance with a material precondition of payment”).

92. S. REP. NO. 99-345, at 5266 (1986).

decision-to-pay standard also provides a more flexible approach that is adaptable to modern forms of fraud. Finally, the express-condition-of-payment standard places a limitation on the FCA that is not necessary to prevent mere breach of contract claims from being inappropriately converted into FCA claims.

A. Implied Certification Prevents Contractor Fraud Throughout a Contract

Prior to addressing conflicting interpretations of implied certification, it is relevant to first address the threshold question of whether, if at all, courts should allow FCA actions under a theory of implied certification. The Seventh Circuit's position that legal falsity under the FCA cannot be established by submission of an invoice for payment, despite a knowing violation of underlying requirements, is far too narrow and hamstrings the FCA, as did the FCA amendments of 1943.⁹³ Under such a view, a contractor's decision to purposefully withhold information from the government that would otherwise preclude payment is not fraud so long as the initial contract was signed in good faith.

For example, a company could be selected for a government contract based on certain criteria, such as minority ownership.⁹⁴ It makes sense that, in order to remain eligible for such a contract, the company agrees to comply with the selection criteria for the remainder of the contract. If the company becomes noncompliant during the course of the contract, purposefully withholds such information, and yet continues to bill the government, this is fraud.⁹⁵ It would not be prudent to prevent the government's use of its primary weapon against such fraud, the FCA.⁹⁶ In addition, Congress has expressly stated that the FCA "is intended to reach all fraudulent attempts to cause the government to pay out sums of money or to deliver property or services."⁹⁷ Limiting FCA actions to situations where a contractor initially enters into a contract in bad faith, as opposed to all bad faith attempts to exact fraudulent payment from the government, frustrates this intent.

In addition to the practical reasons for recognizing implied

93. See generally *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015); Lahman, *supra* note 10.

94. *Ab-Tech Const., Inc. v. United States*, 31 Fed. Cl. 429 (Fed. Cl. 1994) (Defendant Ab-Tech started out compliant with a government program to incentivize minority-owned companies to contract with the Government, but over the course the contract became noncompliant. "In short, the Government was duped by Ab-Tech's active concealment of a fact vital to the integrity of that program.").

95. See *id.*

96. Justice Department Recovers Over \$3.5 Billion, *supra* note 1.

97. S. REP. NO. 99-345, at 5274.

certification, the legislative history and text of the FCA show approval for the doctrine. The 1986 amendments to the FCA indicate that construing the Act to include potential liability for failure to disclose noncompliance (which is the heart of implied certification) is both appropriate and consistent with the FCA's purpose. With the 1986 amendments, Congress defined "knowing" and "knowingly" to include not only actual knowledge of false information, but "deliberate ignorance of the truth" and "reckless disregard of the truth" as well.⁹⁸ Specific intent to defraud is not a requirement for liability under the FCA, which indicates congressional approval of a broad reading of the statute.⁹⁹

The FCA lacks inclusion of the definitions of the terms "false," "fraud," and "fraudulent."¹⁰⁰ This has been interpreted by the Supreme Court as indicative of Congress's acceptance of the common law definition of fraud. Statutes that include, but do not expressly define, terms that have well-settled common law definitions incorporate the established meaning of the terms at common law.¹⁰¹ "Fraud" has a well-settled common law meaning, which includes both affirmative misrepresentation and material omission.¹⁰² Modern restatements continue to impose liability for material omission.¹⁰³

Applying the common law meaning of fraud, which includes liability for a material omission, the FCA should be read to encompass an implied certification of compliance. Concealment of a material fact in order to induce a party to enter into or continue paying on a contract would give rise to a claim for fraud by omission.¹⁰⁴ The FCA is intended to protect taxpayer dollars from fraud generally; it is not limited to fraud by express misrepresentation.¹⁰⁵ To impute such a

98. 31 U.S.C. § 3729(b)(1)(A)(i-iii) (2012).

99. 31 U.S.C. § 3729(b)(1)(B) (2012) ("[A]nd no proof of specific intent to defraud is required.").

100. 31 U.S.C. § 3701(b) (2012) (definitions section lacking the terms "false," "fraud," or "fraudulent"); *see also* Brief of Law Professors as Amici Curiae in Support of Respondents and Affirmance at 7, *Universal Health Services, Inc. v. United States ex rel Escobar*, 136 S. Ct. 1989 (2016) (No. 15-7) ("Although the Act defines the terms 'knowingly' and 'claim' . . . it does not define 'false or fraudulent' because such a definition would be unnecessary.").

101. *Neder v. United States*, 527 U.S. 1, 21 (1999) (stating that when a statute contains a term that has a well-settled meaning at common law, that meaning is imputed into the statute unless the statute itself states otherwise); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) ("Where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)).

102. RESTATEMENT (SECOND) OF TORTS §§ 527, 529, 550, 551 (AM. LAW INST. 1977).

103. *Id.*

104. RESTATEMENT (SECOND) OF TORTS §§ 550, 551 (AM. LAW INST. 1977).

105. *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (stating that legislative history of the FCA suggests "that the Act was intended to reach all types of fraud, without qualification, that

meaning would make the FCA definition of fraud narrower than that at common law and would not advance the FCA's purpose.

B. The Material-to-the-Government's-Decision-to-Pay Standard Better Reflects the Materiality Element of Common Law Fraud

The common law definition of fraud includes a materiality requirement.¹⁰⁶ In the context of fraudulent inducement to enter a contract or make payments, the materiality inquiry centers on whether the actual misrepresentation or omission itself was material in the other party's agreement to the contract.¹⁰⁷ In other words: the inquiry asks whether the misrepresentation or omission was a significant part of the decision making process. The material-to-the-government's-decision-to-pay standard reflects this common law inquiry, and placing a limitation such as express condition of payment is unnecessary.

Inclusion of the common law materiality element into an FCA claim is not only supported by the general rule that, absent indication otherwise, well-settled common law meanings of words are imputed into statutes.¹⁰⁸ The text of the FCA itself also includes a definition of the term "material."¹⁰⁹ While the term material appears in section 3729(a)(1)(B), which covers false records or statements material to a fraudulent claim, it is relevant to the implied certification theory.¹¹⁰ Implied certification covers instances in which a claim itself is not facially false, yet the contractor is noncompliant with some underlying requirement. A contractual obligation is material when noncompliance would prevent the government from paying the claim.¹¹¹ This directly mirrors section 3729(a)(1)(B) in that the defrauding contractor need not make a false claim per se, but rather conceal (whether through statement or omission) some noncompliance that is material to the claim which, in turn, makes the claim false. Combining the materiality element of fraud present at common law with Congress's inclusion of a definition of material in the statute shows that materiality to the decision to pay the

might result in financial loss to the Government").

106. RESTATEMENT (SECOND) OF TORTS § 538(1) (AM. LAW INST. 1977) ("Reliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material.").

107. RESTATEMENT (SECOND) OF TORTS § 538(2) (AM. LAW INST. 1977) (defining materiality as whether a reasonable person would consider it important in the decision-making process or the person who made the misrepresentation had reason to know the particular recipient is likely to consider the matter important in the decision making process).

108. *Neder v. United States*, 527 U.S. 1, 21 (1999).

109. 31 U.S.C. § 3729(b)(4) (2012).

110. 31 U.S.C. § 3729(a)(1)(B) (2012) (establishing liability when a person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim").

111. Rhoad et al., *supra* note 7, at 2.

claim is a relevant inquiry.

Including elements of common law fraud is consistent with the purpose of the FCA. The FCA is intended “to reach all types of fraud, without qualification, that might result in financial loss to the Government.”¹¹² This is an expansive mandate, and it would be counterintuitive to place limits on the Act that would not be present had the government simply brought a common law fraud claim. Lack of a specific intent requirement supports the position that the FCA is intended to provide the government a broader shield than the average citizen, not a narrower one, in protecting itself from fraud.¹¹³ Therefore, the material-to-the-government’s-decision-to-pay standard appropriately incorporates elements of common law fraud that are not superseded by the language of the statute.

*C. The Material-to-the-Government’s-Decision-to-Pay Standard
Provides a More Flexible Approach That Is Adaptable to Modern Forms
of Fraud*

Uniform application of legal standards is an essential part of the American judicial system.¹¹⁴ In some instances, a flexible legal standard capable of being adapted to a variety of facts and circumstances is more desirable than an inflexible, static rule. The FCA, which is meant to cover any and all forms of fraud against the government, is one such situation in which a more flexible standard is desirable. The FCA covers all claims for payment from the government, including vastly different industries like defense contracting and Medicaid claims.¹¹⁵ Instead of creating an easily understood standard, adoption of a bright-line rule for analyzing a statute with such diverse applicability can result in findings that are inconsistent with the statute’s purpose and therefore inappropriate.

Since the 1943 amendments, Congress has expanded the scope of the FCA in several significant ways. Most notably, in 1986 Congress amended the FCA “[i]n order to make the statute a more useful tool

112. *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968).

113. *Id.*; *see also* 31 U.S.C. § 3729(b)(1)(B) (2012) (no proof of specific intent is required under the FCA).

114. ROBERT J. MARTINEAU ET AL., *APPELLATE PRACTICE AND PROCEDURE* 1–6 (2nd ed. 2005) (providing an overview of differing opinions about the nature and function of appellate courts, including uniform application of law and error correction).

115. *United States v. Universal Health Servs., Inc.*, 780 F.3d 504, 512 (1st Cir. 2015) (finding a health care provider can be liable under the FCA for submission of Medicaid claims while noncompliant with underlying regulatory requirements); *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 637 (4th Cir. 2015) (finding a defense contractor can be liable under the FCA for posting untrained guards at a U.S. military base and then falsifying personnel files to show that the guards had passed marksmanship requirements).

against fraud in modern times.”¹¹⁶ The 1986 amendments expanded the FCA by expressly eliminating any specific intent requirement from the definition of “knowingly”¹¹⁷ and by expanding the definition of “claim.”¹¹⁸ The 1986 amendments also lowered the required standard of proof to preponderance of the evidence.¹¹⁹ In 2009, Congress included amendments to the FCA as part of The Fraud Enforcement and Recovery Act, such as an obligation to repay to the government any overpayments on a contract.¹²⁰ In addition to congressional expansion of the FCA’s scope, courts have consistently stated that the purpose of the FCA is to prevent all fraud against the government.¹²¹ Taken together, this congressional expansion and court dicta regarding the purpose of the FCA indicates a preference for an evolving standard that is able to adjust to increasingly complicated contracts in which new ways to defraud the government can develop.

A bright-line rule would unnecessarily restrict application of the FCA. The express-condition-of-payment standard could create a loophole for unscrupulous contractors to escape liability in circumstances where the government contract is not drafted to include, as an express condition of payment, all foreseeable (and possibly unforeseeable) material requirements. This asks too much of drafters of government contracts and gives too much wiggle room to escape FCA liability.

Recent oral argument before the Supreme Court of the United States illustrates why a bright-line, rigid rule in an area of complex regulation such as government contracting is prone to unreasonable application when taken to the logical extreme. In *Universal Health Services v. United States ex rel. Escobar*, the government argued that all contract terms with the government are material.¹²² Therefore, any breach of

116. S. REP. NO. 99-345, at 5267(1986).

117. *Id.*

118. *Id.*

119. *Id.* The 1986 amendments also sought to “encourage any individual knowing of Government fraud to bring that information forward” by increasing the reward to whistleblowers and removing certain limitations on whistleblower suits filed after the Government is aware, in some way, of the alleged fraud. *Id.* Congress’s stated reason for easing restrictions on the whistleblower aspects of the FCA was that “[i]n the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.” *Id.*

120. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (relevant part codified as amended 31 U.S.C. § 3729(b)(3)).

121. *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968); *Ab-Tech Const., Inc. v. United States*, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999); *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1170 (9th Cir. 2006).

122. Ronald Mann, *Argument Analysis: Justices Display Disparate Views on Implied Fraud Under False Claims Act*, SCOTUSBLOG (Apr. 20, 2016).

contract would be material and would open the contractor to FCA liability. This is a broad, untenable standard that is counter to the maxim that FCA liability should not be recognized for “what is, in essence, a breach of contract action”¹²³ and that there is a “crucial distinction between punitive FCA liability and ordinary breaches of contract.”¹²⁴ On the other side of the argument, the defendant in *Universal Health Services* argued that not even material breach regarding a critical component of the contract or total breach could open a contractor to FCA liability.¹²⁵ Justice Sotomayor offered a hypothetical to attempt to clarify this argument, asking whether delivery of “guns that don’t shoot” on a contract for firearms to the U.S. military would constitute a false claim under the FCA.¹²⁶ The contractor argued that, while this may be a material breach of the contract, it does not rise to the level of FCA liability.¹²⁷

The government’s position places a great burden on contractors to comply at all times with all provisions of government contracts, which often include compliance with all relevant regulations.¹²⁸ This interpretation would allow the government to use obscure, even typically unenforced regulations to hit contractors with harsh FCA penalties. However, the government must be able to utilize the FCA to prevent the exact situation raised by Justice Sotomayor’s hypothetical. Delivering unusable guns to the U.S. military is not a mere breach of contract, nor is it a violation of an obscure regulation. Such a breach gets at the core of the contract, and it would be unreasonable for a contractor selling guns to the military to be unaware that the guns don’t function. This would satisfy the knowing requirement of the FCA and therefore liability should be recognized.¹²⁹ Both the government’s and contractor’s positions in *Universal Health Services* are too extreme to be applicable, and illustrate why a materiality inquiry, which provides guidance but allows for case-by-case analysis, strikes an appropriate balance.

<http://www.scotusblog.com/2016/04/argument-analysis-justices-display-disparate-views-on-IMPLIED-fraud-under-false-claims-act/>.

123. *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 635 (4th Cir. 2015) (quoting *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370 (4th Cir. 2008)).

124. *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010).

125. *Mann*, *supra* note 122.

126. *Id.*

127. *Id.*

128. Common language in governmental contracts include accordance or compliance with all relevant regulations.

129. 31 U.S.C. § 3729(b)(1)(A)(iii) (2012) (a person acts knowingly when that person “acts in reckless disregard of the truth”).

D. The Material-to-the-Government's-Decision-to-Pay Standard Provides Appropriate Limitations on FCA Claims

FCA claims are based on a defendant's violation of the statute. FCA plaintiffs "cannot 'shoehorn what is, in essence, a breach of contract action into a claim that is cognizable under the' FCA."¹³⁰ Breach of contract claims are generally not intended to be punitive in nature.¹³¹ Instead, courts seek to make parties whole following a breach of contract via compensatory or expectation, not punitive, damages.¹³² It is therefore inappropriate to utilize a punitive statute, like the FCA, in instances of breach of contract instead of intentional fraud against the government.¹³³

As applied in *Triple Canopy*, the material-to-the-government's-decision-to-pay standard provides adequate guidance, but also allows for fact-specific analysis.¹³⁴ Since the FCA covers a variety of situations ranging from Medicaid payments to security contracting to construction, the ability to tailor the analysis to the facts at hand is particularly beneficial. The Fourth Circuit's argument that Triple Canopy likely believed that the marksmanship requirement for their Ugandan guards was a condition of payment is persuasive.¹³⁵ Otherwise, it seems unlikely that Triple Canopy would have taken the effort to manufacture false marksmanship records. Though apparently not an expressly documented precondition to payment, the requirement that the guards be trained and capable of firing their weapons cuts to the very essence of the contract.¹³⁶ The government surely would not have hired Triple Canopy in the first place had it known the guards could not, in the words of the Fourth Circuit, "shoot straight."¹³⁷ Given the seriousness of

130. *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 635 (4th Cir. 2015) (quoting *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 373 (4th Cir. 2008)).

131. RESTATEMENT (SECOND) OF CONTRACTS § 344 (AM. LAW INST. 1981) (stating that the purpose of judicial remedies for breach of contract includes expectation interest, reliance interest, or restitution interest of the injured party, but does not include a punitive purpose for the breaching party); RESTATEMENT (SECOND) OF CONTRACTS § 355 ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.").

132. RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. LAW INST. 1981) (injured party has a right to expectation damages).

133. Rhoad et al., *supra* note 7, at 2 (the FCA "was enacted to target fraud with punitive sanctions").

134. *United States v. Triple Canopy*, 775 F.3d at 635.

135. *Id.* at 638 ("If Triple Canopy believed that the marksmanship requirement was immaterial to the Government's decision to pay, it was unlikely to orchestrate a scheme to falsify records on multiple occasions.").

136. *Id.* at 632 ("Nothing in [the Triple Canopy contract] expressly conditioned payment on compliance with the responsibilities.").

137. *Id.* at 638.

placing untrained guards around a U.S. military base in a combat zone,¹³⁸ it seems that falsifying these types of records should open the contractor up to FCA liability the same as if Triple Canopy had misrepresented the number of guards provided or some other core provision of the contract. Under the express-condition-of-payment standard, however, Triple Canopy would not have violated the FCA, despite creating actual false documents.

This shows that limiting implied certification to situations in which the falsification is an express condition of payment creates situations in which a contractor can make an outright false statement and yet the government is unable to use its primary tool in combating such fraud. The required element of materiality, present in the “broader-decision-to-pay” standard, provides limitations on FCA liability without drawing an unnecessary line in the sand. Contractors would not be liable under the FCA, for example, due to nonmaterial breaches of a contract or minor regulatory violations. In addition, contractors that could not reasonably have known of the violation would not incur FCA liability.¹³⁹ It is therefore unnecessary to place a rigid limitation like express condition of payment to achieve the goal of preventing innocent contractors from facing punishment under the FCA, as the required elements of knowingly and materiality already place limits on liability.

IV. CONCLUSION

This Casenote’s purpose is to advocate for application of implied certification theory as a valid method of applying liability under the FCA and for the material-to-the-government’s-decision-to-pay standard of review. FCA liability is traditionally applicable whenever an actual request for payment sent to the government contains a false or fraudulent statement.¹⁴⁰ However, modern FCA cases have advanced a

138. See *Al Asad Airforce Base, Al Anbar, Iraq*, A.F.-TECH., <http://www.airforce-technology.com/projects/al-asad-airbase-iraq/> (last visited Apr. 27, 2017); *Operation Iraqi Freedom and Operation New Dawn Fast Facts*, CNN (May 27, 2016), <http://www.cnn.com/2013/10/30/world/meast/operation-iraqi-freedom-and-operation-new-dawn-fast-facts/>. The Triple Canopy contract placed guards at the Al Asad Air Force Base in Iraq, the second largest United States Air Force base during Operation Iraqi Freedom, which lasted from 2003–2010 when it was renamed Operation New Dawn. *Id.*; see also Amrita Jayakumar, *Virginia Court Reinstates Fraud Lawsuit Against Triple Canopy*, WASH. POST (Jan. 15, 2015), https://www.washingtonpost.com/business/capitalbusiness/virginia-court-reinstates-fraud-lawsuit-against-triple-canopy/2015/01/14/72a9340e-9c29-11e4-bcfb-059ec7a93ddc_story.html?utm_term=.67514630df03 (Triple Canopy “hired Ugandan guards to protect U.S. personnel at the government’s second largest Iraq air base in 2009,” the Al Asad Air Base in the Anbar province of Iraq).

139. 31 U.S.C. § 3729(a)(1) (2012) (requiring requisite scienter (knowingly) in order to subject an individual or company to FCA liability).

140. Rhoad et al., *supra* note 7, at 1 (“e.g., a contractor mischarges the Government for goods or

theory called false certification in which liability can apply when the request for payment itself does not contain a false statement, yet is based on a falsification of an underlying agreement.¹⁴¹ This false certification can be express, meaning the individual or company submitting the claim for payment has affirmatively stated that the requirements have been met.¹⁴² Alternatively, the false certification can be implied, meaning the contractor submitted a claim for payment without meeting all underlying requirements but did not actually state that all the requirements have been met.¹⁴³

Most circuits have allowed FCA actions to proceed under a theory of implied certification, but there is a disagreement among those circuits as to whether its application should be narrow or broad.¹⁴⁴ A majority of circuits have adopted the narrower express-condition-of-payment standard, which recognizes FCA liability only when the alleged false certification is in regards to a clear, express requirement upon which payment is predicated.¹⁴⁵ The minority position, however, considers whether the false certification would have materially altered the government's decision-making process, and may recognize FCA liability in situations where the false certification was egregious, yet not specifically related to a clear and express condition of payment.¹⁴⁶

The Supreme Court of the United States granted certiorari on this issue as of December 2015, and issued an opinion on June 16, 2016, holding that government contractors can be held liable under a theory of implied certification.¹⁴⁷ In an opinion penned by Justice Clarence Thomas, *Universal Health Services, Inc. v. United States* sets forth two elements to be met in order to support a finding of liability.¹⁴⁸ First, courts should look to whether the claim in question makes a fraudulent misrepresentation or misleading omission. Second, courts should then look to whether such a misrepresentation or omission conceals a material violation of statutory, regulatory, or contractual

services that were never delivered”).

141. *Id.* at 2; *Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001).

142. *Mikes*, 274 F.3d at 700.

143. *Id.*

144. *Id.*

145. *Id.*; *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 313 (3d Cir. 2011); *United States ex rel. Hobbs v. MedQuest Assocs., Inc.*, 711 F.3d 707, 715 (6th Cir. 2013); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1168 (10th Cir. 2010); *United States ex rel. Keeler v. Eisai, Inc.*, 568 F. App'x 783, 799 (11th Cir. 2014).

146. *United States v. Universal Health Servs., Inc.*, 780 F.3d 504, 512 (1st Cir. 2015) *cert. granted in part*, 136 S. Ct. 582 (2015); *United States v. Triple Canopy, Inc.*, 775 F.3d 632, 637 (4th Cir. 2015).

147. *Universal Health Servs. v. United States ex rel. Escobar* 136 S. Ct. 1989 (2016).

148. *Id.* at 1999.

requirements.¹⁴⁹ Furthermore, *Universal Health Services, Inc.* abrogated *Sanford-Brown* and *Mikes v. Straus* by explicitly allowing liability under the implied certification theory and refusing to limit such liability to an express condition of payment.¹⁵⁰ It remains to be seen, however, whether application of this test by the lower courts will mirror the material-to-the-government's-decision-to-pay standard.

The material-to-the-government's-decision-to-pay standard is faithful to the purpose of the FCA and should be uniformly applied nationwide. First, the material-to-the-government's-decision-to-pay standard better reflects the elements of common law fraud, which should be imputed into the FCA through appropriate statutory interpretation. Second, a more flexible standard is appropriate to combat all forms of fraud against the government, a primary objective and mandate of the FCA. Finally, the express condition of payment is not necessary to place appropriate limits on FCA liability. For these reasons, the broader, more flexible standard of implied certification is preferable, as it recognizes FCA liability in situations where a contractor submits a claim for payment to the government while concealing noncompliance with a material requirement of a contract.

149. *Id.*

150. *Id.* at 1998–1999.